Supreme Court, U.S.
FILED
MAY 28 1993
OFFICE OF THE CLERK

No. 92-1563

In the Supreme Court of the United States

OCTOBER TERM, 1992

GERALD B. WATSON, JR., PETITIONER

v.

DEPARTMENT OF TRANSPORTATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether petitioner was properly removed from federal service as a result of his refusal to participate in a required random drug test.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-21) is unpublished, but the judgment is noted at 983 F.2d 1088 (Table). The opinion of the Merit Systems Protection Board (Pet. App. 22-42) is reported at 49 M.S.P.R. 509. The decision of the Administrative Law Judge (Pet. App. 43-71) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on November 18, 1992. A petition for rehearing was denied on December 29, 1992. Pet. App. 72-73. The petition for a writ of certiorari was filed on March 26, 1993. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. On September 15, 1986, President Reagan issued Executive Order No. 12,564, entitled "Drug-Free Federal Workplace," which made it a condition of employment for all federal employees to refrain from using illegal drugs, both on and off duty. See 51 Fed. Reg. 32,889. The order also required each Executive agency to "develop a plan for achieving the objective of a drug-free workplace with due consideration of the rights of the government, the employee, and the general public," and provided that each such plan was to include drug testing. *Id.* at 32,890. In response to that order, the Federal Aviation Administration (FAA) adopted a program that subjected incumbents of petitioner's position—which was "safety critical"—to random drug testing.[1] Pet. App. 2, 23-24, 26-27.

2. On August 18, 1988, petitioner was randomly selected for drug testing. Pet. App. 23. Acting upon the advice of an attorney, petitioner refused to take the drug test. *Id.* at 24. As a consequence, petitioner was immediately relieved of safety-related duties and given "administrative type" work. *Id.* at 94. Later that day, petitioner went to a private clinic and provided a urine sample, which was then sent to a commercial laboratory for testing. *Id.* at 24. The test results from that laboratory, subsequently submitted to the agency by petitioner, indicated that he was "negative." *Ibid.* The laboratory, however, had not been certified by the

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[1] Executive Order No. 12,564 provides that disciplinary actions "(including removal from the service, if appropriate) shall be taken in compliance with otherwise applicable procedures, including the Civil Service Reform Act." 51 Fed. Reg. 32,891 (1986).

Department of Health and Human Services as meeting federally mandated standards. *Id.* at 27-28.[2]

On August 23, 1988, petitioner filed a civil action for declaratory and injunctive relief in the United States District Court for the District of Oregon. Pet. App. 48. The district court dismissed the action for lack of subject matter jurisdiction, holding that the Civil Service Reform Act provides the exclusive procedure for petitioner's challenge to the constitutionality of the random drug testing program. *Ibid.* On August 31, 1988, the FAA served notice that it proposed to remove petitioner from his position on the basis of his refusal to provide a urine specimen in accordance with the agency's random drug testing program. *Ibid.* Petitioner was removed on November 10, 1988. *Ibid.*

3. Petitioner appealed his removal to the Merit Systems Protection Board (MSPB). Pet. App. 44. Following a hearing, an administrative law judge (ALJ) concluded that the FAA's charge was supported by the evidence, and rejected all of petitioner's attempts to justify his refusal to submit to urinalysis. *Id.* at 49-54. However, the ALJ mitigated the penalty of removal to a 45-day suspension. *Id.* at 68. The ALJ found it "questionable" (*id.* at 60) whether the agency exercised discretion in selecting petitioner's penalty, citing a declaration submitted by Melissa J. Allen (the national coordinator for the agency's testing program) and the ALJ's own skepticism about the testimony of petitioner's supervisor. *Id.* at 55-60. Alternatively, the ALJ concluded that even if petitioner's supervisor or the agency "considered the relevant factors and exercised some

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[2] On April 11, 1988, the Department of Health and Human Services issued "Mandatory Guidelines for Federal Workplace Drug Testing Programs," which, *inter alia*, "establishe[d] standards for certification of laboratories engaged in urine drug testing for Federal agencies." 53 Fed. Reg. 11,970.

judgment, the penalty is still beyond the tolerable limits of reasonableness." *Id.* at 60.

The MSPB reversed the ALJ's mitigation of the penalty. Pet. App. 22-42. The MSPB noted that except in certain limited circumstances not applicable here, an employee in petitioner's position is required to "obey then grieve" (*id.* at 32-33, citing *Gragg* v. *United States Air Force*, 13 M.S.P.R. 296, 299 (1982), appeal dismissed, 717 F.2d 1343 (Fed. Cir. 1983)), and it found "no merit" in petitioner's "contention that the 'obey then grieve' rule should be suspended in this case." Pet. App. 32. The MSPB then concluded that "[t]he record [did] not support the [ALJ's] finding that the agency had predetermined the penalty." *Id.* at 35. The MSPB explained that the ALJ gave insufficient weight to Allen's declaration, and noted that the ALJ's disbelief of petitioner's supervisor was based on the legally erroneous premise that the supervisor was required "to provide a list of circumstances that might have caused him to adopt a lesser penalty." *Id.* at 35-37. Finally, the MSPB rejected the ALJ's conclusion that the penalty was unreasonable, observing that the ALJ had considered as "mitigating" certain legally irrelevant factors, and had concluded—contrary to petitioner's own testimony—that petitioner was willing to obey future drug testing directives without reservation. *Id.* at 37-40.

4. The court of appeals affirmed. Pet. App. 2-21. The court noted that under *Jackson* v. *Veterans Administration*, 768 F.2d 1325, 1331 (Fed. Cir. 1985), the MSPB generally owes no deference to the ALJ's findings, but that the MSPB must articulate a "sound reason" when it rejects the ALJ's evaluation of testimonial evidence. Pet. App. 3-4. The court concluded that the MSPB articulated a "sound reason" in petitioner's case by relying on Allen's declaration and by explaining that the ALJ's credibility evaluation was

based on an erroneous legal premise—*i.e.*, that petitioner's supervisor was required to provide a more complete list of circumstances that might have caused him to seek a milder penalty. *Id.* at 3. The court then concluded that the MSPB's decision to remove petitioner—including the MSPB's conclusion "that the factors supporting mitigation were simply outweighed by those supporting removal"—was supported by substantial evidence. *Id.* at 4. Finally, the court approved the MSPB's application of the "obey then grieve" rule, noting that this Court applied a similar rule in *Walker* v. *City of Birmingham*, 388 U.S. 307 (1967). Pet. App. 6-7.

Judge Newman dissented. Pet. App. 8-16. She noted that suspicionless drug testing had been held unconstitutional by the Ninth Circuit (in a decision later reversed by this Court) at the time petitioner refused to participate (see *Railway Labor Executives' Ass'n* v. *Burnley*, 839 F.2d 575 (9th Cir. 1988), rev'd *sub nom. Skinner* v. *Railway Labor Executives' Ass'n*, 489 U.S. 602 (1989)), and argued that equitable principles counseled against removal in view of petitioner's reliance on Ninth Circuit precedent. Pet. App. 15-16.[3]

ARGUMENT

The court of appeals correctly applied settled principles of administrative law in concluding that the MSPB's decision was supported by substantial evidence. Petitioner's fact-bound disagreement with the court of

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[3] Judge Michel filed a concurring opinion. Pet. App. 17-21. He pointed out that the argument advanced by Judge Newman in dissent had been waived by petitioner, and explained that in any event any error was harmless because Judge Newman failed to demonstrate that, even assuming that petitioner's reliance on Ninth Circuit law should be given mitigating weight, the MSPB abused its discretion by not reducing the penalty. *Ibid.*

appeals' application of those principles does not warrant review.

1. Petitioner first contends (Pet. 9-13) that the court of appeals erred in sustaining the MSPB's failure to defer to the ALJ's conclusions. Petitioner concedes (Pet. 11) that *Jackson* v. *Veterans Administration*, 768 F.2d 1325 (Fed. Cir. 1985), on which the court of appeals relied, correctly sets forth the circumstances under which the MSPB may depart from an ALJ's credibility determinations. Applying that test, the court reasonably concluded that the MSPB gave adequate reasons for declining to defer to the ALJ in this case. See Pet. App. 2-4. Because petitioner raises no important or unsettled issue of law, but merely invites the Court to review the record to determine whether the court of appeals correctly applied the *Jackson* test in the circumstances of this case, further review is not warranted.

2. Petitioner next contends (Pet. 13-19) that the court of appeals allowed the MSPB to cure the agency's failure to exercise discretion in selecting a penalty. That contention ignores the record. First, the MSPB specifically found that the FAA itself had exercised the required discretion (see Pet. App. 37-38), so there was no void for the MSPB to fill. Second, the court of appeals affirmed the MSPB's finding that the deciding FAA official exercised discretion in selecting the penalty. *Id.* at 3-4. Because the court of appeals did not hold, as petitioner suggests, that the MSPB may rationalize the agency's failure to exercise discretion, the decision below is fully consistent with *SEC* v. *Chenery Corp.*, 332 U.S. 194 (1947), and with the statutory provisions for MSPB and judicial review of agency decisions, 5 U.S.C. 7513(d) and 7701(c)(1).

3. Finally, petitioner contends (Pet. 19-27) that the FAA was required to follow the Ninth Circuit's decision striking down suspicionless drug testing until that

decision was reversed by this Court, and that the agency's failure to obey settled law and petitioner's reliance on the Ninth Circuit's decision are circumstances that should be considered in mitigation as a matter of law. As the court of appeals noted, however, petitioner failed to make those arguments below, and he accordingly waived them. Pet. App. 5; *id.* at 19 (Michel, J., concurring). In any event, as the court below also noted, the state of the law when petitioner refused to take the drug test was "plainly unsettled, even in the Ninth Circuit," because this Court had already granted certiorari to review the Ninth Circuit's conclusion. *Id.* at 5-6 (citing *Burnley* v. *Railway Labor Executives' Ass'n*, 486 U.S. 1042 (1988)). Finally, petitioner's argument concerning the weight to be given an employee's understanding of the controlling law in determining an appropriate penalty runs afoul of the "obey then grieve" rule sanctioned by this Court in *Walker* v. *City of Birmingham*, 388 U.S. 307 (1967). Pet. App. 6-7, 17-19.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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